Public Bank Bhd v Perwira Affin Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2 (S6)–22–138 OF 1990
KAMALANATHAN RATNAM J
11 MAY 2001

Land Law *— Sale of land — Banker's undertaking — Release of — Undertaking by end financier to master chargee to release loan sum — Construction of undertaking — Whether compliance with undertaking subject to client's instructions — Whether performance of garnishee order abrogated defendant from performing its undertaking*

By an agreement dated 19 November 1980 between one Dr R Perumal ('the purchaser') and Pekan Gunung Realty Sdn Bhd ('the developer'), the purchaser agreed to purchase and the developer agreed to sell all that parcel of land known as QT (R) 21415, Lot No 5887, Mukim of Rantau, Daerah Seremban, together with a three storey shophouse to be constructed thereon for the sum of RM280,000. Pursuant to the purchaser's application, the defendant bank approved a loan to the purchaser in the sum of RM50,000 to finance the purchase of the property. The plaintiff was at all material times the bridging financier for the developer in respect of the development pursuant to a loan granted to the developer through the plaintiff's letter of offer dated 23 August 1984. On or about 7 June 1985, the plaintiff received a letter of undertaking dated 7 June 1985 from the defendant wherein the defendant undertook to release payments to the developer's account with the plaintiff against presentation of the relevant architect's certificates certifying the actual stage of the building works completed pursuant to the terms and conditions of the agreement. The plaintiff forwarded the architect's certificate of practical completion dated 11 July 1986 and demanded from the defendant the sum of RM50,000 pursuant to the defendant's undertaking. Since no payment was made, the plaintiff then proceeded to issue a demand on the defendant through its solicitors by their letter of 30 August 1989. The defendant argued that the undertaking was subject to the purchaser's instructions and that the sale and purchase agreement between the purchaser and the developer was terminated. The defendant also further contended that the amount of RM50,000 had been paid out pursuant to a garnishee order dated 21 October 1988 issued by the Seremban High Court and therefore the defendant could not pay the RM50,000 into the developer's account with the plaintiff.

Held:

(1) The undertaking was from the defendant and addressed to the plaintiff. The undertaking stated that the defendant was to release payments to the developer's account maintained at the plaintiff's Kuala Lumpur main office. The undertaking was from the defendant to the plaintiff and to no other (see p 134D–E). There were two conditions in the undertaking, namely, that a second

charge be created in favour of the defendant and that payments would be made upon presentation of the relevant architect's/ engineer's certificate, certifying the actual stage of completion of the property pursuant to the agreement. As such there is no such third condition, nor was the plaintiff acting as agent of the purchaser when it issued the undertaking. If the purchaser did instruct the defendant not to pay out on his loan, such an event will not affect the undertaking from the defendant to the plaintiff, as the defendant had not expressly guarded against the same in the undertaking (see pp 135H–136A, B–C).

(2) The sale and purchase agreement subsisted at all material times and the property was completed and duly delivered to the purchaser, albeit late (see p 137E). In any event, whether or not the defendant paid out any money to satisfy the garnishee order, it does not abrogate the defendant from performing its obligations pursuant to the undertaking. The Seremban High Court had never made any order releasing the defendant from its obligations pursuant to the undertaking (see p 138D).

[Bahasa Malaysia summary

Melalui satu perjanjian bertarikh 19 November 1980 antara Dr R Perumal ('pembeli tersebut') dan Pekan Gunung Realty Sdn Bhd ('pemaju tersebut'), pembeli tersebut bersetuju untuk membeli dan pemaju bersetuju untuk menjual semua bahagian tanah yang dikenali sebagai QT (R) 21415, Lot No 5887, Mukim Rantau, Daerah Seremban, bersama-sama dengan rumah kedai tiga tingkat yang akan dibina di atasnya untuk jumlah sebanyak RM280,000. Di atas permohonan pembeli, defendan bank telah meluluskan pinjaman kepada pembeli sebanyak RM50,000 untuk membiayai pembelian hartanah tersebut. Plaintif pada semua masa matan adalah pembiaya (bridging financier) untuk pemaju berkenaan dengan kemajuan perumahan tersebut menurut surat tawaran plaintif bertarikh 23 Ogos 1984. Pada atau lebih kurang 7 Jun 1985, plaintif telah menerima surat akujanji bertarikh 7 Jun 1985 daripada defendan di mana defendan mengaku janji untuk melepaskan wang kepada akaun pemaju yang dibuka dengan plaintif selepas pengemukaan sijil-sijil arkitek yang relevan mengesahkan peringkat sebenar kerja-kerja pembangunan yang telah siap menurut terma-terma dan syarat-syarat perjanjian tersebut. Plaintif telah mengemukakan sijil penyelesaian praktikal arkitek bertarikh 11 Julai 1986 dan menuntut daripada defendan jumlah RM50,000 menurut akujanji defendan. Oleh kerana tiada pembayaran dibuat, plaintif terus mengeluarkan tuntutan ke atas defendan melalui peguamnya melalui surat mereka bertarikh 30 Ogos 1989. Defendan menghujahkan bahawa akujanji tersebut adalah tertakluk kepada arahan pembeli dan bahawa perjanjian jual beli antara pembeli dan pemaju telah ditamatkan. Defendan selanjutnya menghujahkan bahawa jumlah sebanyak RM50,000 telah pun dibayar

menurut perintah yang digarnis bertarikh 21 Oktober 1988 yang dikeluarkan oleh Mahkamah Tinggi Seremban dan dengan itu defendan tidak boleh membayar RM50,000 ke dalam akaun pemaju bersama dengan plaintif.

Diputuskan:

(1) Akujanji tersebut adalah dari defendan dan ditujukan kepada plaintif. Akujanji tersebut menyatakan bahawa defendan akan membayar ke akaun pemaju yang sedia ada di ibu pejabat plaintif di Kuala Lumpur. Akujanji tersebut adalah daripada defendan kepada plaintif dan bukan kepada sesiapa yang lain (lihat ms 134D–E). Terdapat dua syarat di dalam akujanji, bahawa, suatu gadaian yang kedua diwujudkan bagi pihak defendan dan bahawa pembayaran-pembayaran akan dibuat selepas pengemukaan sijil arkitek/jurutera yang relevan, mengesahkan peringkat sebenar peringkat penyelesaian yang sebenar hartanah tersebut menurut perjanjian tersebut. Oleh yang demikian tidak terdapat syarat yang ketiga, atau plaintif bertindak sebagai wakil pembeli apabila ia mengeluarkan akujanji tersebut. Jika pembeli benar-benar mengarahkan untuk tidak membayar pinjamannya, suatu kejadian sedemikian tidak akan menjejaskan akujanji daripada defendan kepada plaintif, oleh kerana defendan tidak secara nyata memperuntukkan mengenainya di dalam akujanji tersebut (lihat ms 135H–136A, B–C).

(2) Perjanjian jual beli tersebut adalah berterusan pada semua masa matan dan hartanah tersebut telah disiapkan dan diserahkan kepada pembeli, walaupun lewat (lihat ms 137E). Walau apa sekalipun, sama ada atau tidak defendan membayar sebarang wang untuk memuaskan perintah garnis tersebut, ia tidak melepaskan defendan daripada melaksanakan kewajipannya menurut akujanji tersebut. Mahkamah Tinggi Seremban tidak pernah membuat sebarang perintah melepaskan defendan daripada kewajipannya menurut akujanji tersebut (lihat ms 138D).]

Notes

For cases on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2833–3271.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Choe Kuan Him, Re, Advocate & Solicitor; T Damodaran v Choe Kuan Him [1975] 2 MLJ 274 (refd)

Foley v Hill (1848) 2 HL Cas 28 (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)
Michael C Solle v United Malayan Banking Corp [1986] 1 MLJ 45 (refd)
Syarikat Jengka Sdn Bhd v Tri-Trade Properties (M) Sdn Bhd & Anor [1988] 3 MLJ 163 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)
United Malayan Banking Corp Bhd v Warisan Niaga (M) Sdn Bhd & Ors [1990] 2 CLJ 110 (refd)

GL Ambrose (*Chooi & Co*) for the plaintiff.
Wong Hok Mun (*Azim Tunku Farik & Wong*) for the defendant.

Kamalanathan Ratnam J. : By an agreement dated 19 November 1980 ('the agreement') between one Dr R Perumal ('the purchaser') and Pekan Gunung Realty Sdn Bhd ('the developer'), the purchaser agreed to purchase and the developer agreed to sell all that parcel of land known as QT(R) 21415, No Lot 5887, Mukim of Rantau, Daerah Seremban, together with a three storey shophouse to be constructed thereon and described in the said agreement as No 12, Taman Bukit Emas ('the property') for the sum of RM280,000 which sum was later increased by mutual consent to RM281,368. The property was part of a development known as Taman Bukit Emas which was undertaken by the developer on two pieces of land known as Grant No 17036 for Lot No 4191 Mukim of Rantau, Negeri Sembilan, and Grant No 17062 for Lot No 5526, Mukim of Rantau, Negeri Sembilan, which were owned by the developer. Pursuant to the purchaser's application, the Government of Malaysia (Perbendaharaan Malaysia) approved a loan to the purchaser in the sum of RM140,400 to finance the purchase of the said property. It was a condition of the loan from the Government of Malaysia that the loan was to be secured by a first legal charge over the said property and this was done.

Pursuant to the purchaser's application, the defendant bank approved a loan to the purchaser in the sum of RM50,000 to further finance the purchase of the said property. It was a condition of the loan from the defendant that the loan was to be secured by a second legal charge over the said property and this too was done. The plaintiff was at all material times the bridging financier for the developer in respect of the Taman Bukit Emas development pursuant to a loan granted to the developer through the plaintiff's letter of offer dated 23 August 1984. The plaintiff was at all material times a chargee of the property pursuant to two charges which charges are reflected on the title deed of the said property.

Defendant's undertaking

On or about 7 June 1985, the plaintiff received a letter of undertaking dated 7 June 1985 from the defendant ('the undertaking'). By this undertaking, subject to a creation of a second charge over the property in favour of the defendant, the defendant undertook to release payments to the developer's account with the plaintiff known as Account No 02–06290–8 against

presentation of the relevant architect's certificates certifying the actual stage of the building works completed pursuant to the terms and conditions of the agreement. The said undertaking also requested for the release of the original document of title. To enable the said first and second legal charges to be created over the property, the plaintiff discharged its charges over the property. The original document of title and the duly executed discharge of charge were then released and the first and second legal charges were then created over the property in favour of the Government of Malaysia and the defendant respectively.

The defendant however maintained that the developer's account with the plaintiff, known as Account No 02–06290–8 was an overdraft account held in trust for the plaintiff.

The demand

Pursuant to the developer's irrevocable letters of authority, both dated 22 August 1984, the plaintiff was duly authorised by the developer to release and/or transfer all monies from the developer's Taman Bukit Emas project to settle all the said developer's liability owing to the plaintiff.

The plaintiff forwarded the architect's certificate of practical completion dated 11 July 1986 and the said certificate of fitness of occupation dated 15 December 1987 together with other documents to the defendant with its letter of 2 July 1988 and demanded from the defendant the sum of RM50,000 pursuant to the defendant's undertaking. Since no payment was made, the plaintiff then proceeded to issue a demand on the defendant through its solicitors by their letter of 30 August 1989.

The plaintiff's claim

The plaintiff therefore prayed for:

(a) a declaration that the defendant has breached its undertaking;

(b) an order that the defendant do comply with the undertaking;

(c) the sum of RM50,000;

(d) further or alternative damages;

(e) interest at the rate of 8%pa from 16 March 1990 (date of the statement of claim) to date of payment; and

(f) costs.

Findings of the court

As the court sees it there is only one issue for the plaintiff, namely, whether there is a valid undertaking from the defendant to the plaintiff, which has yet to be fulfilled. The defendant too has only one issue, namely, whether there has been an intervening factor legally preventing the defendant from fulfilling its undertaking.

Nature of a valid undertaking

An 'undertaking' is defined in the *New Shorter Oxford English Dictionary*, Vol 2 N-Z (1993) as, inter alia, 'a pledge, a promise and a guarantee'. It is clear and unchallenged that the document at p 122 of the common agreed bundle of documents is an undertaking. The construction to be given to an undertaking is similar to that applied to an ordinary contract. In *Michael C Solle v United Malayan Banking Corp* [1986] 1 MLJ 45, Hashim Yeop Sani FJ said at p 46 as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said.

The breach of an undertaking attracts damages in the same manner as a breach of contract (see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 786). It is therefore correct to state that an undertaking is similar to that of contractual relationship.

Is there an undertaking by the defendant?

It is clear that the undertaking is from the defendant and addressed to the plaintiff. The undertaking states that the defendant was to release payments to the developer's Account No 02–06290–8 maintained at the plaintiff's Kuala Lumpur main office. It is my judgment that the undertaking has to be construed as it is expressed. I find that the undertaking is from the defendant to the plaintiff and to no other. I also find that the undertaking is for the defendant to pay a certain sum into the developer's account upon the conditions therein being satisfied. I am further fortified in holding this view because if the undertaking was to the developer or for the benefit of the developer, the defendant would have simply addressed its undertaking to the developer and not to the plaintiff. It must therefore necessarily mean, in the present case, that the undertaking is to the plaintiff and for the benefit of the plaintiff.

DW1, the defendant's senior vice-president, had also testified that where there is '... redemption sums payable to a master chargee (the plaintiff in this case), the arrangement is for the end-financier (the defendant in this case) to undertake to make payment directly to the master chargee ...'. With this admission it is not difficult to conclude that the defendant had undertaken to pay the plaintiff albeit into the developer's account at the plaintiff bank. DW1 had attempted to explain that the present case was different when he stated that payment was '... not the developer as in this case. As the wording of the undertaking in issue is specific in that payment is to be made to the developer ...'. I do not agree. It is my finding that the payment expressed in the undertaking is not to the developer as suggested by DW1 but to the plaintiff, namely, to the developer's account maintained at the plaintiff's Kuala Lumpur main office.

The House of Lords in *Foley v Hill* (1848) 2 HL Cas 28 held at p 36 as follows:

> ... Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v Marchant*, 1 Phillips 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; ...

Further, on the same page and continued overleaf, the law lords said:

> ... The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.

It is my finding therefore that the undertaking, by stating that payment was to be made to the developer's account maintained at the plaintiff's Kuala Lumpur main office, is in fact to be treated as payment to the plaintiff for the plaintiff to use as it pleases. PW1, the plaintiff's credit control manager, had also given unchallenged evidence that an undertaking of the kind given by the defendant bank to the plaintiff (also a bank) will only occur if the developer is indebted to the later bank in which the developer has an account. Such being the case, the defendant bank must certainly be aware that such payment must necessarily be for the benefit of the plaintiff. In any event, PW1 has stated that the sums credited into the developer's account at the plaintiff bank is for the benefit of the plaintiff as the said account is held in trust for the plaintiff based upon the letters tendered. Accordingly, I find that all sums credited into the account of the developer at the plaintiff bank is not only for the benefit and use of the plaintiff according to law (see *Foley*'s case), but also in fact, since the account was not only held in trust for the benefit of the plaintiff but as the defendant itself had admitted, such undertakings could also be treated as payment of redemption sums for the benefit of the master chargee, that is the plaintiff in this case.

Have the conditions in the undertaking been fulfilled?

There are two conditions in the undertaking, namely, that a second charge be created in favour of the defendant and that payments would be made upon presentation of the relevant architect's/engineer's certificate, certifying the actual stage of completion of the property pursuant to the

agreement. There is no dispute that the second charge has been created in favour of the defendant. It was also admitted by the defendant in cross-examination that the relevant architect's/engineer's certificate certifying the actual stage of completion of the property pursuant to the agreement, has been presented to the defendant. It was also expressly admitted by the defendant in cross-examination that the said two conditions had been fulfilled. However, the defendant attempts to argue that there is a third condition, namely, that the undertaking is subject to the purchaser's instructions. In other words, the defendant argues that the undertaking is issued by the defendant as agent for the purchaser and therefore subject to the purchaser's instructions. It is my judgment that there is no such third condition, nor was the plaintiff acting as agent of the purchaser when it issued the undertaking. In *Syarikat Jengka Sdn Bhd v Tri-Trade Properties (M) Sdn Bhd & Anor* [1988] 3 MLJ 163, one of the issues that arose was whether an undertaking issued by the second defendant (a solicitor) was issued as an agent of the first defendant. The undertaking in that case expressly stated at p 164 as follows:

> We act for Tri-Trade Properties (M) Sdn Bhd who have instructed us to issue this letter of undertaking in connection with their purchase of certain quantities of plywood products which have been negotiated between our clients and yourselves.

Zakaria Yatim J (as his Lordship then was) held that the undertaking letter expressly stated that the second defendant acted for the first defendant. In the case before me the undertaking makes no reference that it was issued upon the purchaser's instructions. I find that in construing the undertaking in this present case, save for the two conditions which have been satisfied, there are no other conditions. The language used in the undertaking is clear and unambiguous. DW1 testified that the purchaser is a customer of the defendant bank and a bank must act in accordance with the customer's instructions and/or mandate. Whilst this may very well be the general rule, a failure to express the same as a precondition in the undertaking will not entitle the defendant to insist on something which was never expressed and avoid liability. There is simply no such condition in the undertaking given by the defendant to the plaintiff.

In *United Malayan Banking Corp Bhd v Warisan Niaga (M) Sdn Bhd & Ors* [1990] 2 CLJ 110, Siti Norma Yaakob J (as she then was) quoted with approval the case of *Re Choe Kuan Him, Advocate & Solicitor; T Damodaran v Choe Kuan Him* [1975] 2 MLJ 274. I reproduce the relevant part of that judgment herewith at p 276:

> ... It is for him to consider the probable effect of such instrument before he signs it for the language of an instrument is to be taken most strongly against the party using it. The fact that subsequent to the undertaking events occur which alter the position, such as his client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself. The standard required is so high that the courts have allowed only one defence, that of mistake.

In the circumstances, if the purchaser did instruct the defendant not to pay out on his loan, such an event will not affect the undertaking from the defendant to the plaintiff, as the defendant had not expressly guarded against the same in the undertaking.

In any event, payment from the defendant pursuant to the undertaking was due and owing even before the stop payment instructions were received from the purchaser (see the demand letter dated 2 July 1988 issued by the plaintiff to the defendant enclosing the relevant documents necessary for calling on the undertaking which was received by the defendant on or about 2 July 1988). Payment by the defendant was to be made within 14 days from the date of the demand, that is, on or before 16 July 1988. The stop payment instructions were only received from the purchaser earliest on 23 July 1988. Accordingly, the defendant should have complied with the demand on the undertaking.

The agreement between the purchaser and the developer

The defendant also states that the sale and purchase agreement between the purchaser and the developer was terminated. Therefore, the defendant argues that since the sale and purchase agreement has been terminated, the undertaking need not be performed.

I find that the sale and purchase agreement subsisted at all material times and that the property was completed and duly delivered to the purchaser, albeit late. The defendant relies on the letter from the developer's solicitors to the purchaser wherein the developer had attempted to terminate the agreement. The defendant also relies on the judgment of the learned judge of the Seremban High Court dated 4 August 1989 wherein the learned judge had stated that the agreement was terminated. It must be noted that the plaintiff was neither a party to the letter from the developer's solicitors nor in the Seremban High Court proceedings.

In the Seremban High Court proceedings, the plaintiff herein applied to intervene which was dismissed with costs by the learned judge. Therefore, it is only right that the plaintiff be allowed to argue the issue of the undertaking between the plaintiff and the defendant since the plaintiff was never even allowed to intervene in the Seremban proceedings and accordingly this issue was never heard. In fact, the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 198 in applying the passage by Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at p 115 explains this issue this way:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

In any case, in a short written judgment the learned judge of the Seremban High Court held that 'the sale and purchase agreement was terminated by' the developer. This statement is clearly inaccurate since by an earlier

decision the court had already granted specific performance of the agreement and the agreement was indeed specifically performed with the completed property being delivered to the purchaser.

Any supervening events?

The defendant contends that the amount of RM50,000 had been paid out pursuant to a garnishee order dated 21 October 1988 issued by the Seremban High Court and that therefore the defendant could not, and did not pay the RM50,000 into the developer's account with the plaintiff. It must be noted that the defendant itself opposed the garnishee proceedings as testified by DW1. However, the plaintiff's attempts to intervene in the Seremban High Court proceedings to oppose the garnishee proceedings were denied at first instance by the learned senior assistant registrar ('the SAR'). On appeal to the judge in chambers, the learned judge affirmed the decision of the learned SAR. Hence, the plaintiff was never a party to the garnishee proceedings.

In any event, whether or not the defendant paid out any money to satisfy the garnishee order, it does not abrogate the defendant from performing its obligations pursuant to the undertaking. Further, whilst the garnishee order was made absolute, the Seremban High Court never made any order releasing the defendant from its obligations pursuant to the undertaking.

An undertaking of the type as in the case before me, from a bank must be given the due recognition of an undertaking from a bank, and not to be equated to that of an undertaking given by a mere layman. An analogy can be drawn with that of a bank guarantee, performance bond or even a standby letter of credit issued by a bank. It is my judgment that an undertaking from a bank is similar in effect as that of a bank guarantee, performance bond or standby letter of credit. Should a bank be allowed to abrogate itself from the same, the consequences can be very damaging and far reaching not only in the banking industry but more so in the commercial and business industries. I hold that an undertaking from a bank should be given the due recognition similar to an undertaking from a solicitor. An undertaking such as this must be construed strictly against the bank issuing it; otherwise, the practice of usury which relies heavily on honour and standing will lose its lustre. If a bank cannot take for granted that an undertaking given to it by another bank will be honoured without having to have a court to decide if such an undertaking is a valid or an enforceable undertaking, then the position of a layman giving an undertaking will seem meaningless. It is, therefore, my judgment that notwithstanding the Seremban High Court proceedings, the defendant owes an independent duty and obligation as stipulated in the undertaking and the defendant has to discharge the same. Since the defendant has failed to discharge its obligations pursuant to the undertaking, I grant the plaintiff:

(a) a declaration that the defendant has breached its undertaking;

(b) an order that the defendant do comply with the undertaking;

(c) judgment for the sum of RM50,000;

(d) interest at the rate of 4%pa from 16 March 1990, being the date of the filing of the claim to the date of judgment; and

(e) costs.

Order accordingly.

Reported by Benjamin Yong